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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 918

HONORABLE HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original order of the court of appeals denying the government's petition for a writ of mandamus (Pet. App. 5–6), its order granting the writ after reconsideration (Pet. App. 7–9), and petitioner's opinion refusing to vacate certain portions of his order directing the filing of a bill of particulars (A. 50–53),[1] are not reported.

[1] References to the government's Appendix in the court below are designated "A.", and references to petitioner's Supplemental Appendix, "S.A."

JURISDICTION

The order of the court of appeals, directing petitioner to vacate his order that the government furnish certain particulars in this criminal case, was entered on October 4, 1966 (Pet. App. 8–9), and a petition for a rehearing *en banc* was denied on December 5, 1966 (Pet. App. 10). The petition for a writ of certiorari was filed on December 29, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's order, directing the government to turn over, by way of a bill of particulars, the names of certain informants who were prospective witnesses in a criminal case, constituted a clear abuse of discretion warranting the issuance of a writ of mandamus.

STATUTE AND RULES INVOLVED

Internal Revenue Code of 1954:

SEC. 7206. FRAUD AND FALSE STATEMENTS.

Any person who—

(1) DECLARATION UNDER PENALTIES OF PERJURY.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * *

* * * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.
[26 U.S.C. 7206(1).]

Federal Rules of Criminal Procedure:[2]

RULE 7. THE INDICTMENT AND THE INFORMATION

* * * * *

(f) BILL OF PARTICULARS. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

RULE 16. DISCOVERY AND INSPECTION

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photo-

[2] As they appeared prior to the amendments effective on July 1, 1966. That was subsequent to the events in this case and the amended rules are accordingly inapplicable. Application of the new rules would not, we believe, lead to a different result. See p. 8, *infra*.

graphs and may prescribe such terms and conditions as are just.

RULE 17. SUBPOENA

* * * * *

(c) FOR PRODUCTION OF DOCUMENTARY EVIDENCE AND OF OBJECTS

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

In June 1965, Simmie S. Horwitz was indicted in the United States District Court for the Northern District of Illinois on charges of wilfully and knowingly subscribing corporate income tax returns which understated the corporation's gross sales by large amounts, in violation of 26 U.S.C. 7206(1) (A. 7–9). The defendant filed a motion for a bill of particulars asking that the government be required to answer 20 questions (A. 9–15). On November 29, 1965, petitioner granted the motion with some immaterial exceptions (A. 46; S.A. 1–5). The government then moved (A. 46; S.A. 6–7, 11–12) that the order be vacated with respect to certain questions, on the

ground that answers to these questions would involve naming all of the individuals who would testify for the prosecution, and thus afford an occasion for tampering with the witnesses (S.A. 2–3; A. 6–8, 10, 17; cf. A. 44–46).[3] Petitioner denied the motion (A. 47, 52). The government subsequently answered some of the questions, and another was withdrawn, leaving only question 25 in dispute. It reads (A. 13):

> 25. If the answer to Request No. 24[4] is in the affirmative, state with respect to each such statement, if there was more than one:
>
> (*a*) The name and address of the person to whom the statement was made;
>
> (*b*) The date on which the statement was made;
>
> (*c*) The place where it was made;
>
> (*d*) The substance of the statement;
>
> (*e*) Whether the persons to whom the statement was made was a Government Agent at the time of the statement;
>
> (*f*) The names and addresses of any other persons present at the time the statement was made; and
>
> (*g*) Whether a written memorandum or verbatim transcript of the oral statement was

[3] These questions called for the names of the payors of all unreported sales, insofar as determined by the government (A. 10, 11); for the names of all persons to whom petitioner had made oral statements upon which the government relied (A. 13); and for the name of any person upon whose statement the government relied (A. 14).

[4] Question 24, which the government answered affirmatively (A. 37), provides (A. 13):

> 24. Does the Government rely upon any oral statements of the Defendant to support the charge in the several counts of the Indictments.

made, and, if so, whether the Government has possession of the memorandum or transcript.

At a hearing on March 14 (S.A. 33–53), the government specifically asked petitioner to vacate his order directing that question 25 be answered (S.A. 34), and further narrowed the issue by agreeing to give the defendant all oral statements made to government agents (S.A. 36–37), thus limiting its objection to oral statements made by the defendant to third-party informants who were not participants in the alleged offense (S.A. 37, 39–40, 48–49). The government urged that there was always a danger that such witnesses would be tampered with if their identities were revealed (S.A. 39, 44; cf. S.A. 16). Petitioner, noting that the government had not shown such a danger in this case, declined to change his order that the government answer the question (S.A. 37–49; cf. S.A. 16–17).

The government obtained a stay of further proceedings from the court of appeals; a petition for a writ of mandamus was filed on March 21, 1966; and, on March 24, 1966, petitioner was directed to show cause why the writ should not issue (Pet. App. 2–4). On July 12, 1966, a panel of the court of appeals denied the writ (Pet. App. 5–6), but, on the government's motion for reconsideration, the panel on October 4, 1966, issued the writ, and on December 5, 1966, the court *en banc* denied petitioner's request for a rehearing (Pet. App. 7–10).

ARGUMENT

1. A court of appeals has, of course, jurisdiction to issue a writ of mandamus when a district court has

clearly misinterpreted its authority under the federal rules of procedure (*Schlagenhauf* v. *Holder*, 379 U.S. 104, 110, 111; see, also, *Miner* v. *Atlass*, 363 U.S. 641; *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 257; *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382–383[4]), including the criminal rules (*In re United States*, 348 F. 2d 624 (C.A. 1); cf. *Petition of United States*, 306 F. 2d 737 (C.A. 9); *United States* v. *Igoe*, 331 F. 2d 766 (C.A. 7), certiorari denied, 380 U.S. 942).

2. The purpose of a bill of particulars is to protect the defendant against a second prosecution for the same offense and to enable him to prepare his defense without fear of unfair surprise (*Norris* v. *United States*, 152 F. 2d 808, 811 (C.A. 5), certiorari denied, 328 U.S. 850)—not to compel disclosure of the government's evidence prior to trial (*United States* v. *Kushner*, 135 F. 2d 668, 673 (C.A. 2), certiorari denied, 320 U.S. 212; *United States* v. *Lebron*, 222 F. 2d 531, 535–536 (C.A. 2), certiorari denied, 350 U.S. 876; *Downing* v. *United States*, 348 F. 2d 594, 599 (C.A. 5), certiorari denied, 382 U.S. 901). Thus, the courts have rarely required the government to give the names of its witnesses. *United States* v. *Eddington*, 328 F. 2d 760, 761 (C.A. 7), certiorari denied, 379 U.S. 818; *United States* v. *Lebron*, *supra*.

Petitioner has adopted a contrary approach. He acknowledges that—in all criminal cases—he requires the government to disclose to the defense the identity of persons who were alleged to have been present when the offense was committed (S.A. 8–15). In the

[4] *United States* v. *Bondy*, 171 F. 2d 642 (C.A. 2), upon which petitioner relies (Pet. 12, 17), was decided prior to the cited decisions of this Court.

present case he went even further and directed the government to reveal the identity of persons who were present when the defendant made oral statements, whether as part of the actual crime or not, and whether incriminatory or non-incriminatory (S.A. 35, 44). And instead of requiring the defense to show cause why the names of the witnesses were necessary, as provided by Rule 7(f) at that time (*supra*, p. 3), he required the government to show cause why the names should not be disclosed (S.A. 3–4, 15–17, 39, 45).

The approach of petitioner—which in effect permits discovery to the same extent as in civil proceedings—is manifestly contrary to the Criminal Rules, and a proper subject of correction by writ of mandamus. It is significant to note that such an approach was strenuously urged upon this Court prior to the adoption of the recent amendments. See, *e.g.*, Symposium, *Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 63, 92, 96. But it was rejected (save that the requirement that the defense show cause was eliminated from Rule 7(f)).

3. Petitioner's approach is also inconsistent with the teachings of this Court in *Roviaro* v. *United States*, 353 U.S. 53, and *Rugendorf* v. *United States*, 376 U.S. 528. The names sought by question 25 were, as in *Roviaro* and *Rugendorf*, the names of informants. *Roviaro* holds that the informant's privilege is important for "the furtherance and protection of the public interest in effective law enforcement" (353 U.S. at 59). In that case, it was clear from the outset that the informant was the sole participant, other

than the accused, in the transaction which gave rise to the alleged offense, and that he was the "only witness in a position to amplify or contradict the testimony of government witnesses" who had observed the offense from some distance.[6] *Id.* at 64. This Court held that, "under these circumstances", prejudicial error had been committed in refusing to disclose the informant's identity. *Id.* at 65. The circumstances here are far different. In *Roviaro,* the informant was, as noted, the only other participant in the criminal offense aside from the defendant himself; here, the informants, for all that at present appears, have done no more than hear the defendant make oral statements relative to the charged offense. In *Roviaro,* the informant was not called to the stand by the government; here, the government has assured petitioner (S.A. 37) that the informants will take the stand.

Since the defendant will ultimately have an opportunity to hear the testimony of the informants, his interest in immediate disclosure of their testimony is no more than an interest in enjoying the advantage of pretrial discovery—an advantage traditionally denied criminal defendants (S.A. 42–43). We submit that the "public interest in protecting the flow of information" (*Roviaro* v. *United States, supra,* 353 U.S. at 62) plainly entitles the government to shield its informants from harassment prior to trial. Here, as in *Rugendorf* v. *United States, supra,* 376 U.S. at

[6] The Court pointed out that Roviaro's request for a bill of particulars should have been granted because it was obvious from the indictment that the informant was a material witness. 353 U.S. at 65, n. 15.

535, the defendant "failed to develop the criteria of *Roviaro* necessitating disclosure * * *."

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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